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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

CHESTER DEAN KISER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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March 11, 1968

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v.

CHESTER DEAN KISER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, Missouri-Kansas-Texas Railroad Company, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the Supreme Court of the State of Oklahoma in Case No. 40808, entitled "Missouri-Kansas-Texas Railroad Company versus Chester Dean Kiser", entered September 12, 1967 and to review the orders of said Court entered November 7, 1967 and January 26, 1968, denying your petitioner's petition for rehearing and second petition for rehearing, as amended.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma (Appendix A attached hereto) has not yet been reported.* The orders of the Court denying the said petitions for rehearing are attached hereto (Appendices B and E).

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* The opinion was written by three attorneys, called "Special Masters", who were "appointed by the court". The Chief Justice

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on September 12, 1967, its denial of petitioner's first petition for rehearing was entered November 7, 1967, and its denial of petitioner's second petition for rehearing, as amended, filed following grant of leave to file, was entered January 26, 1968. The court below, by order entered February 5, 1968, stayed enforcement of the mandate pending petition for review by this Court. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

This Court has jurisdiction to grant certiorari for the following reasons:

1. The Supreme Court of Oklahoma has denied to petitioner, Missouri-Kansas-Texas Railroad Company, the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Federal Constitution by applying Section 126 of Title 66 of the Oklahoma Statutes one way as to petitioner and in a diametrically opposite way to other railroad companies under the same or similar circumstances, which has resulted in a judgment of liability under said statute against petitioner and judgments of no liability under said statute as to such other railroad companies.

2. The Supreme Court of Oklahoma has denied to petitioner the due process of law guaranteed to it by the Fourteenth Amendment to the Federal Constitution by

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then assigned the case to Justice McInerney "for review and study" after which and "upon consideration by the court", the opinion was "adopted" per curiam. (Appendix A). There is no constitutional or statutory authority in the State of Oklahoma for the appointment of "Special Masters" or the farming out to them, for "a preliminary advisory opinion", any litigation pending before the Oklahoma Supreme Court. Such procedure is itself a denial of due process, which includes the right of litigants to have their cases decided solely by the justices of the Oklahoma Supreme Court, who are elected for that purpose.

affirming a judgment against petitioner upon a finding which is totally unsupported by any evidence in the record.

3. The discriminatory application of the state statute by the Supreme Court of Oklahoma has rendered said statute invalid under the Fourteenth Amendment to the Federal Constitution, and the judgment against petitioner based upon such invalid statute is likewise invalid.

This Court manifestly has jurisdiction to review such arbitrary and discriminatory action of the Supreme Court of Oklahoma, and to set aside its judgment. This salutary action will serve as an admonition to all state courts that the equal protection and due process guarantees of the Fourteenth Amendment to the Federal Constitution must be followed in the administration of justice.*

QUESTIONS PRESENTED

The judgment against defendant entered in the court below raises three separate but related questions with respect to rights guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States. These questions are stated separately:

ONE. Whether the Supreme Court of Oklahoma did deny to petitioner, Missouri-Kansas-Texas Railroad Com-

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* The Federal Constitutional questions here presented were raised on petition for rehearing, as amended, which the Oklahoma Supreme Court "considered and denied" (Appendices C, D and E). When, as here, an aggrieved party is informed for the first time of a change in the consistent application of a state statute by the opinion of the state appellate court adversely finding against the aggrieved party in a manner wholly different from the application of said statute to all others similarly situated, then this Court has recognized that a petition for rehearing presents the first available opportunity for properly raising such federal questions: *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677; and *Missouri ex rel* v. *Gehner*, 281 U.S. 313, 320.

pany, the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Federal Constitution when it applied Section 126 of Title 66 of the Oklahoma Statutes to petitioner in a way diametrically opposite to its application of that same statute to all other railroad companies under the same or similar circumstances, which has resulted in a judgment of liability under said statute against petitioner and judgments of no liability under said statute as to such other railroad companies?

TWO. Whether the Supreme Court of Oklahoma did deny to petitioner the due process of law guaranteed to it by the Fourteenth Amendment to the Federal Constitution when it affirmed a judgment against petitioner upon a finding which is not supported by any evidence in the record?

THREE. Whether the above described application of the state statute by the Supreme Court of Oklahoma renders said statute invalid under the Fourteenth Amendment to the Federal Constitution, and whether the judgment against petitioner based upon such statute, as so applied, is likewise invalid?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a railroad company operating in the State of Oklahoma as well as in the States of Missouri, Kansas and Texas, was the defendant against which a civil ac-

tion was brought by plaintiff Kiser in the District Court of Bryan County, Oklahoma, to recover damages for personal injuries sustained by plaintiff in a crossing accident at Colbert, Oklahoma on January 13, 1961. The only issue on which plaintiff submitted evidence was whether petitioner had complied with the requirements of Title 66, Oklahoma Statutes, Section 126. This statute provides:

> "Sec. 126. *Bells and Whistles*
>
> "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The language of this Oklahoma statute specifically provides that a railroad has the alternative duty of *either* blowing a whistle *or* ringing a bell as warning of the approach of its train, and unless plaintiff shows by evidence that NO warning, *neither* bell *nor* whistle, was given, plaintiff shall not recover under this statute against defendant. All the decisions of the Supreme Court of Oklahoma, prior to the decision in this case, have so applied this statute over a period of many years.* The

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* Representative decisions of the Oklahoma Supreme Court are reported in:

Wilson v. *C.R.I.&P. R. Co.*, 429 P. 2d 763 (Okl. 1967); *M-K-T R. Co.* v. *French*, 368 P. 2d 652 (Okl. 1961); *Atchinson, T.&S.F. Ry. Co.* v. *Raleigh*, 194 Okl. 589, 154 P. 2d 62 (1944); *Kugler* v. *White*, 91 Okl. 130, 216 Pac. 903 (1923); *M.K.&T. Ry. Co.* v. *Raines*, 59 Okl. 52, 158 Pac. 936 (1916); *Missouri, O. & G. Ry. Co.* v. *Parker*, 50 Okl. 491, 151 Pac. 325 (1915).

court below reaffirmed its long followed application of this statute in *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, decided only three months prior to the decision here sought to be reviewed.

Plaintiff Kiser failed to meet the statutory requirement that he *prove* petitioner did not sound either a whistle or a bell. Plaintiff sought by four witnesses to establish that no "whistle" had been sounded by defendant's train prior to his injury, but failed to show by these witnesses or by any others, and did not even inquire of them, whether a "bell" had been rung. Relying upon the consistent application of the statute by the Oklahoma Supreme Court, defendant filed a demurrer to such evidence, which was overruled by the court.

The Supreme Court of Oklahoma in disposing of defendant's appeal failed and refused to apply the requirements of the above-quoted state statute in the same impartial manner as it had so recently done in *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, and as it had done in suits involving all other railroads since the statute was enacted. The statute is so clear and unambiguous as not to permit a different application to petitioner from that consistently applied by the Court in all other cases involving the same statute. The federal constitutional questions sought to be reviewed were raised in the court below on petition for rehearing (Amendment to Second Petition for Rehearing, Appendices C and D). The court denied petitioner's petition for rehearing and amendment thereto by order entered January 26, 1968. (Appendix E). In so doing and in failing to accord to petitioner the same rights and defenses under the statute which it has accorded to all other railroads operating in the State of Oklahoma, the Supreme Court of Oklahoma denied to petitioner the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. The opinion of the court below affirming the judgment in favor of plaintiff Kiser against petitioner,

contained in Appendix A, infra, did not overrule its previous decisions involving this Oklahoma statute; it arbitrarily permitted plaintiff in this case to recover a judgment against this petitioner without requiring the proof that is required by the statute. In so doing the court below arbitrarily so applied the statutory requirements to petitioner as to single out, discriminate against and impose on petitioner different legal duties and obligations under the statute than are imposed by that court on other railroads under the same statute under the same or similar circumstances.

REASONS FOR GRANTING WRIT

It is respectfully submitted that this petition for a writ of certiorari should be granted for each of the following reasons:

I.

There can be no doubt as to the intendment of the applicable Oklahoma Statute, Section 126, quoted in full above, or the long followed application of said statute by the Oklahoma Supreme Court. Without a single departure until the present suit, the court below has followed the same decisional basis, i.e., that one complaining of a violation of this statute must *prove* that the railroad complained of *neither* blew the engine whistle *nor* rang the engine bell. As recently as three months prior to the decision herein, the Oklahoma Supreme Court reaffirmed this application, stating:

> "In connection with the alleged failure to sound the whistle, plaintiff says that 'a minimal requirement of statute and case law in the operation of a train is the sounding of a whistle 1320 feet before reaching a crossing' and argues that 'the testimony of Mr. Roberts (the refinery employee), *standing alone, and with nothing else*, was sufficient to take the case to the jury'.

> "We are unable to agree. In passing, we note that the statute, 66 O.S. 1961, § 126, requires only the sounding of the bell *or* the whistle. *As we have seen, there was no evidence that the bell was not sounded.*" (*Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, 766). (emphasis supplied).

Thus every railroad, except petitioner in this case, has been accorded the judicially sanctioned right to comply with the said statute by one of two alternative methods of warning. But petitioner, for no known reason, under the same statute and under the same or similar circumstances, has been held civilly liable on a jury finding that it had failed to comply with one of the two alternative methods, i.e., the failure to blow the engine's whistle. The jury could make no finding with respect to whether the engine's bell had been rung since no evidence was presented on this point.*

The question here presented resulting from the Oklahoma Court's refusal to accord to petitioner the same rights and defenses in the suit below that it has accorded at all other times to all other railroads under the same or similar circumstances is one involving the fair and impartial application of a statute which on its face is fair, unambiguous and constitutionally sound. The vice of the decision below lies not in the statute itself but rather in the unequal, arbitrary and patently discriminatory application of said statute to petitioner in a manner wholly different from its application to all other railroads. This Court has often held that though a state statute be fair and impartial on its face, the protection of the Fourteenth Amendment is not

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* While the court below suggests that the finding of the jury includes an inference that there was no signal, including the ringing of a bell, there is no evidence on which such an inference or finding could be made. As stated by the Court in *Wilson* v. *C.R.I.&P. R. Co., supra,* "* * *. there was no evidence that the bell was not sounded".

to be immunized by the unequal and discriminatory application of such statute in a different way to different persons. The language of this Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373, is explanatory of the principle petitioner here relies on and believes controlling on this question:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as to practically make unjust and illegal discriminations between persons in similar circumstances * * * the denial of equal justice is still within the prohibition of the Constitution".

Where a court, as here, through arbitrary application of a statute lays an uneven hand on those who have conducted themselves in the same manner and finds one liable and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

The judgment of the court below is squarely in conflict with the principle announced by this Court in *Yick Wo* v. *Hopkins*, *supra*, which has been followed in innumerable subsequent cases. See *Griffin* v. *Illinois*, 351 U.S. 12, 17; *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 295, 301; *Swain* v. *Alabama*, 380 U.S. 202, 223; *U. S.* v. *Louisiana*, 380 U.S 145, 154; *Reitman* v. *Mulkey*, 87 Sup. Ct. 1627, 1631.

The recent civil rights decisions embodied in the cases last cited have, we believe, given new strength and vitality to judicial enforcement of this principle. This Court also has long recognized and applied this principle to the protection of business and property holders who have been denied equal protection of the law in the operation of their business or the ownership and use of their property. Thus, in *Cotting* v. *Kansas City Stockyards Company*, 183 U.S. 79, 112, this Court refused to enforce a state statute discriminating against one company solely because of its size, stating: "* * * equal protection is denied

when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other". And in *Oyama* v. *California*, 332 U.S. 633, 645, this Court refused to permit a burden of proof to be judicially imposed on one property holder resulting from statutory construction and application which was not also imposed on other property holders, finding such burden was clearly discriminatory. The reasoning on which this principle is based is unassailable; there can be no equality of different persons before a court of law if a statute, fair and impartial on its face, is applied to one person one way and in a totally different way to other persons in the same or similar circumstances.

It would be difficult to find a clearer example of an unequal and patently discriminatory application of a statute than that revealed by a comparison of *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, and the decision here in *M-K-T* v. *Kiser*: both cases involve the same court; the same statute; the same type of action (suit to recover damages for personal injuries); a single vital issue (whether a bell or whistle had been sounded); and the same identical procedural basis (demurrer to the evidence). In the *Wilson* case the court below held that absent proof of failure to sound the engine bell as well as the engine whistle, the demurrer to the evidence must be sustained. In the instant *Kiser* case, decided only three months later, the court below refused to sustain petitioner's demurrer despite the absence of evidence required by the statute and imposed liability on petitioner. The Equal Protection Clause of the Fourteenth Amendment forbids such selective inequality in the application of a statute.

This Court has long recognized that judicial action by a state, as well as legislative and executive action, is in all respects subject to the requirements of the Fourteenth Amendment since those requirements apply to exertions of state power in all forms. And this is true even though the statute enforced by judicial action is on its face

or by its terms impartial and equally applicable to all. Three quarters of a century ago this Court stated: "But it must be observed that the prohibitions of the amendment (Fourteenth) refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities * * *". *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 233. A more complete historical review of this principle is found in *Shelley* v. *Kraemer*, 334 U.S. 1, 18, in which this Court stated:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials."

The arbitrary refusal of the Oklahoma Supreme Court to apply its prior settled law under this statute to petitioner is not a mere trial error; it is a denial of equal protection of the law. There is no evidence here that petitioner did not sound its engine bell or that the witnesses did not hear the bell. When a plaintiff fails to make his proof under the statute, the court below cannot set aside the statutory requirements of proof and cure the error by conjecture. The offhand suggestion of the court below that if there is evidence that the witnesses did not hear one signal, it can be inferred that the railroad did not sound another signal, does not meet the requirements of the law as consistently applied by the court below in all other cases. See *Wilson* v. *C.R.I. & P. R. Co.*, *supra*. If this arbitrary application of the statute is permitted, the court below can grant or deny liability of its own choosing in every case under color of law.

This Court has long recognized that "* * * a denial of constitutionally protected rights demands judicial protection." *Reynolds* v. *Simms*, 377 U.S. 533, 566. The action of the court below in singling out and imposing a judgment of liability against petitioner and judgments

of no liability under the same statute as to other railroads is a classic invidious discrimination. Here petitioner and other railroads are charged under the same statute with the same duties under the same or similar circumstances subject to the same penalties in the same state. It is axiomatic that all persons are equal before the law and are entitled to the same rights under the law under the same or similar circumstances.

The constitutional principle of equality under the law is of fundamental importance, regardless of the type of action in which it is raised, whether in a criminal proceeding, in suits to protect civil rights, or, as here, in a suit based on tort in which petitioner seeks protection against an invalid and unlawful judgment. Your petitioner is also entitled to the protection of the Fourteenth Amendment and should not be denied its rights merely because it is a railroad and a foreign corporation in the state in which the suit was instituted and judgment rendered. When an otherwise valid statute is applied in an unconstitutional manner, such application should not be permitted to stand.

II.

There is no evidence to support the judgment of the court below and such judgment should be set aside because of a denial of due process of law. As heretofore stated, plaintiff Kiser submitted evidence only as to a whistle. He did not present or even attempt to present any evidence whatsoever with respect to whether or not the Railroad's engineer rang the engine bell. But evidence of petitioner's failure to sound alternative warnings, neither a whistle nor a bell, is under the Oklahoma statute a necessary and mandatory part of plaintiff's burden of proof to support a judgment. Because of plaintiff's failure of proof, the judgment imposed on petitioner, now affirmed by Oklahoma's highest court, is unsupported

by evidence, unjust and a denial to petitioner of due process of law.

Under the "due process" requirement of the Fourteenth Amendment no judgment or order may be sustained if not supported by substantial evidence. This principle is so firmly established that it requires little discussion:

I.C.C. v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 91;
Postal Telegraph Cable Co. v. *Newport*, 247 U.S. 464, 473;
Morgan v. *U. S.*, 298 U.S. 468, 480;
Ohio Bell Telephone Co. v. *Commission*, 301 U.S. 293, 302;
Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 393;
United States ex rel Vajtauer v. *Commissioner*, 273 U.S. 103, 106;
Brown v. *Mississippi*, 297 U.S. 278;
Tot v. *United States*, 319 U.S. 463, 473, (concurring opinion of Mr. Justice Black);
Schware v. *Board of Bar Examiners*, 353 U.S. 232, 247;
Thompson v. *Louisville*, 362 U.S. 199, 204;
Garner v. *Louisiana*, 368 U.S. 157, 163;

The judgment here sought to be reviewed is in conflict with the many decisions above cited.

The opinion of the court below implies that where plaintiff's evidence did not meet the statutory requirement in that it related only to a whistle, the court and the jury could infer that petitioner did not sound its bell. Such an inference is wholly without foundation in the record. The transcript of evidence in the trial court shows unequivocally that not a single witness testified as to whether or not a bell was rung. There being no evidence, neither the court nor the jury could make a finding as to the sounding of a bell. Plaintiff below having failed completely to tender any evidence on this vital part

of his proof, the judgment of the court below is unsupported by evidence and defendant's demurrer to the evidence should have been sustained. The failure and refusal of the court below to sustain defendant's demurrer denied to this petitioner the protection afforded it by the due process clause of the Fourteenth Admendment.

III.

The discriminatory application of the state statute by the Supreme Court of Oklahoma, as above set forth, has rendered Section 126 of Title 66 Oklahoma Statutes invalid under the Fourteenth Amendment to the Federal Constitution. See *Concordia Fire Insurance Company* v. *Illinois*, 292 U.S. 535, 545; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (concurring opinion of Mr. Justice Stewart); *Reitman* v. *Mulkey*, 87 Sup. Ct. 1627. Being invalid, the judgment against petitioner based on that statute is likewise invalid. A statute rendered null and void by an application prohibited by the Fourteenth Amendment will not support a judgment. Compare *Frost* v. *Corporation Commission*, 278 U.S. 515; *McLaughlin* v. *Florida*, 379 U.S. 184; *Cox* v. *Louisiana*, 379 U.S. 536. Accordingly, the judgment against petitioner is invalid and should be reversed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated March 11, 1968

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,

vs.

CHESTER DEAN KISER,
Defendant in Error.

SYLLABUS

1. In an action of legal cognizance, where there is any competent evidence presented by the plaintiff reasonably tending to establish plaintiff's cause of action alleged in his petition, defendant's demurrer to the evidence and motion for directed verdict should be overruled.

APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

Honorable Ralph B. Hodges, Judge

Action for damages. From verdict and judgment for plaintiff, defendant appeals.

AFFIRMED

PER CURIAM:

This cause arose from a collision between a railroad train operated by the Missouri-Kansas-Texas Railroad Company and a road roller being used on highway construction operated by Chester Dean Kiser. The parties

will be referred to by their trial court designation. The plaintiff, Chester Dean Kiser, offered evidence to support his cause of action, the defendant, Missouri-Kansas-Texas Railroad Company, demurred to the evidence of the plaintiff, which demurrer was overruled and the defendant elected to stand on the demurrer. The cause comes here on appeal by the defendant from the order overruling the motion for new trial, which was based on the trial court overruling the demurrer to the evidence.

The evidence of the plaintiff reflected him to be employed by the McKnight Construction Company in the construction of Highway #75-A, the duties being pursued at the time of the accident consisting of the pulling of a road roller or packer on the newly constructed roadway; and at the time of the accident such work was being performed back and forth across the railroad crossing at which the alleged accident occurred. The course of conduct being followed by the plaintiff was driving over the crossing in one direction, making a turn and driving the packer in the opposite direction over the crossing and continuing this course of conduct until the accident occurred. There appeared to be no operating defects in the vehicle being operated by the plaintiff.

A witness, Thomas Morris Hamilton, highway patrolman, testified of the circumstances found at the scene of the accident and related that the measured distance from the railroad crossing and the point of impact to the point ascertained as the position in which the engineer stopped, as being seven hundred sixty-nine feet (769′), and that portions of the packer were knocked ninety-nine feet to two hundred fifty feet (99′ to 250′) away from the point of impact.

The medical testimony is not reviewed nor considered at this point since the question of injury and quantity of damages does not appear to be urged in the brief of the defendant.

Arlan Edward Whittington testified for the plaintiff that he was driving a truck, waiting at a set of weighing scales along the side of the railroad track; that he had seen the train shortly before pulling up to the scales; that he heard no signal, whistle or anything until just before the impact with the plaintiff. He further testified that if the train was whistling or had whistled before the point of impact, he did not hear it; however, that he had no trouble hearing the train whistle just before the point of impact. He did not actually see the impact. On cross-examination, the witness testified that he became aware of the approach of a train about the time that he stopped his truck; that he did not know whether his windows were up or down, and that although he saw the train coming, he was not paying particular attention because he was not anticipating crossing the tracks. He further testified on cross-examination that he would not say the train had not whistled before the time he heard it; but simply that if it whistled, he did not hear it.

The witness Glenda Castle testified for the plaintiff that she was sixteen (16) years old, familiar with the crossing involved in the accident; that she and some of her friends were walking about one-third (⅓) of a block away from the railroad track and apparently were walking toward the railroad crossing; that she heard the train whistle, looked up and the impact occurred. She testified this was the first time she heard the train whistle. On cross-examination she testified she was not looking for the train, that it might have whistled before, but if so, she did not hear it.

The witness Carolyn Taylor, seventeen (17) years old, testified that she was walking with the witness Glenda Castle toward the railroad crossing, heard the train whistle blow, looked up, a comment of danger was made, and the impact occurred. She stated she had not been paying any attention to the train or anything before that time, and that her attention was attracted by the train whistle.

The witness Nath Work testified that the crossing was a clear crossing, that he drove up to the set of scales south of the road and west of the railroad track and stopped; that at the time he stopped he heard a train whistle and the collision happened as he looked up; that he had no trouble hearing the train whistle at the time. On cross-examination, he testified that his left window was down but the right window was closed in his vehicle; that he was interested and thinking about getting his truck weighed and going back for additional gravel; that he was not watching for the train, was not listening for a whistle to blow, and that he did not know whether or not the train had whistled before he stopped his truck.

At the close of plaintiff's evidence and the overruling of defendant's demurrer, the defendant elected to stand on the demurrer, offered no evidence and the court instructed the jury, which thereafter returned a verdict for the plaintiff.

It is the contention of the defendant that the evidence of the plaintiff in regard to the duty and violation thereof, of the defendant to blow a whistle or sound a bell eighty rods (80 rds.) prior to the railroad crossing, is not supported by probative evidence, but that all of the evidence introduced was negative evidence without probative value, and that the demurrer to the evidence should have thus been sustained.

The contention of the defendant does not give to the plaintiff's evidence and all inferences properly taken therefrom, the probative force to which such evidence is entitled. Four witnesses testified that they heard the whistle immediately before impact; that they did not hear a whistle before that time. There was sufficient competent evidence for the jury to find that the train made no sound or signal sufficient to draw their attention to its presence prior to the whistle immediately before impact. It is to be noted that the verdict of the jury is such that the ability to know and observe the happening of the event

in question, viz, the blowing of a whistle eighty rods (80 rds.) from the railroad crossing, was determined in favor of the plaintiff. The probative value of the evidence was apparently weighed by the jury. The proximity of the witnesses to the scene, the physical ability to hear of the witnesses, and their attention or inattention to the warning whistle or other signal were all determined, under proper instructions, in favor of the plaintiff. When a witness was in a position to make observation as to whether a certain fact existed or a certain thing happened, and he testified that he did not know of the existence of the fact or did not observe that the thing happened, his testimony is not negative, but has probative force and must be submitted to the jury.

This court has previously held in Ft. Smith & W.R. Co. v. Moore, 66 Okl. 322, 169 P. 904, under a set of facts in which a number of bystanders swore that neither the bell rang nor the whistle sounded until the danger of the plaintiff actually appeared, that such testimony was not purely negative; but, whether positive or negative, it was within the province of the jury to determine the facts after considering all of the evidence in light of the surrounding circumstances. We said in this case, page 908,

> "If persons are in hearing distance of an alleged sound, and it does not appear that their hearing is impaired, their testimony as to whether or not a sound was made should be considered by the jury. If, when the engineer on a railway train testified that he sounded the bell or whistle for a crossing, his testimony could not legally be disputed by other witnesses testifying that they were close enough to hear and that the bell was not rung or the whistle blown, in many cases there would be no way of establishing this character of negligence."

The applicable factual circumstances are that the witnesses in the cited case testified they did not hear the whistle prior to the danger, but that they did hear the

whistle when the danger to the plaintiff actually appeared and this is a determinative factor in the instant case.

In the case of St. Louis-San Francisco Ry. Co. v. Rundell, 108 Okl. 132, 235 P. 491, this court accepted the proposition that the testimony of one who was physically able to hear in such proximity as to permit hearing and whose attention was not so diverted from the circumstances as to have prevented the hearing of a whistle, was a positive statement of fact, though negative in form.

In St. Louis-S.F. Ry. Co. v. Russell, 130 Okl. 237, 266 P. 763, this court followed the proposition set forth in the Rundell case, supra, and applied this proposition of law to the testimony of two witnesses, the first who was one hundred fifty feet (150′) from the railroad crossing involved, and the second who testified that although he heard the short blast given by the train just before the impact, he did not hear any other whistle and bell between the highway and the Santa Fe crossing; and his further testimony was that the train could have whistled shortly after crossing the Santa Fe tracks and escaped his hearing. In the cited case, it was held that such evidence was sufficient for the submission of the cause to the jury and such evidence, though negative in form, was positive as to character. See also St. Louis-San Francisco Ry. Co. v. Robinson, 99 Okl. 2, 225 P. 986; Kugler v. White, 91 Okl. 130, 216 P. 903; Sand Springs Ry. Co. v. McWilliams, 170 Okl. 85, 38 P.2d 539. It is more than noteworthy in the instant case that all of the witnesses who testified for the plaintiff stated that the whistle of the train, immediately before the impact with the plaintiff, was clearly audible, and this fact alone is sufficient proof that all the witnesses were in a position to hear a train whistle, possessed an ability to hear the train whistle and were giving such attention to the railroad as to satisfy the requirements of all of the cited cases. From the fact that the witnesses did hear the train whistle immediately before the impact the jury may properly infer that the witnesses were in the position to

hear, possessed the ability to hear, and were giving such attention to the train and crossing that had the train whistled or indicated its presence by other signal eighty rods (80 rds.) before the crossing in question, the witnesses would each have heard the whistle, or other signal.

Defendant further contends that there is an entire absence of evidence relating to the ringing of a bell. The testimony of the four witnesses that their attention was first drawn to the train by the whistle immediately before impact and the finding of the jury that the statutory signals, blowing whistles and ringing bells, were not complied with by the defendant, necessarily includes a reasonable inference or conclusion that there was no signal, including the ringing of a bell of at least thirty pounds weight, prior to the blast of the whistle which everybody heard. In support of this contention, defendant cites Missouri, Kansas & Texas RR. Co. v. Flowers, 187 Okl. 158, 101 P.2d 816. In the Flowers case, supra, the court held that the evidence of the driver that he heard neither bell nor whistle before driving his truck into the train did not constitute sufficient evidence, standing alone, under all the circumstances presented therein, that no warning was given. We held in Wilson v. C.R.I.&P. RR. Co., et al., Okl., 429 P.2d 763, that the testimony of a witness, standing alone, who was located about a quarter of a mile from the railroad track working near two motors, that he did not hear a whistle was insufficient evidence to prove the train did not whistle. These cases are distinguishable on their facts to the instant case in which four witnesses in a position near the crossing testified to not hearing a signal. It appears reasonable that, had any signal been given prior to the point of impact, such signals would have been noticed.

There being no other error urged in this appeal, the judgment of the trial court is affirmed.

The court acknowledges the services of Frank M. Ogden, who with the aid and counsel of Robert H. Loofbour-

row and Don Dale, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the court. The Chief Justice then assigned the case to McInerney, J. for review and study, after which and upon consideration by the court, the foregoing opinion was adopted.

Jackson, C.J., Irwin, V.C.J., and Davison, Williams, Blackbird, Berry, Lavender and McInerney, J.J., concur.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Filed In Supreme Court of Oklahoma, Nov. 7, 1967,
ANDY PAYNE, Clerk

THE CLERK IS HEREBY DIRECTED TO ISSUE THE FOLLOWING ORDERS:

40808—Missouri-Kansas, Texas RR. Company v. Chester Dean Kiser. Petition for Rehearing denied and Application for Oral Argument Denied.

FLOYD L. JACKSON,
Chief Justice.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,

versus

CHESTER DEAN KISER,
Defendant in Error.

Application for Leave to File Second Petition for Rehearing; Motion for Extension of Time Within Which to File Same; and Motion for Permission to File Typewritten Brief with Duplicator-Printed Copies

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SECOND PETITION FOR REHEARING

BRIEF IN SUPPORT OF
SECOND PETITION FOR REHEARING

Leave is hereby granted to file this 21 day of November, 1967.

FLOYD L. JACKSON,
Chief Justice

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APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING; MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE SAME; AND MOTION FOR PERMISSION TO FILE TYPEWRITTEN BRIEF WITH DUPLICATOR-PRINTED COPIES

Comes now the plaintiff in error, the Missouri-Kansas-Texas Railroad Company, a corporation, and respectfully shows the Court that heretofore, to-wit, on the 12th day of September, 1967, a judgment and decision of this Court was rendered, affirming the judgment of the District Court of Bryan County, State of Oklahoma, in favor of the defendant in error and against plaintiff in error; and

That thereafter, on the 11th day of October, 1967, plaintiff in error filed in said case its petition for rehearing, which said petition was by this Court overruled on the 7th day of November, 1967.

That the opinion of this Court is in conflict with the controlling statute and decisions, as more fully appears in the attached second petition for rehearing.

That although the decision of the Court was made on the 7th day of November, 1967, the undersigned counsel of record for the plaintiff in error was not advised of the Court's decision and had no actual notice of the action of the Court until this date.

WHEREFORE, plaintiff in error prays for leave to file this, its second petition for rehearing, a copy of which petition is hereto attached, together with brief in support thereof, out of time; and further moves that the Court

grant it permission to file a typewritten brief with duplicator-printed copies.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

SECOND PETITION FOR REHEARING

Comes now the Missouri-Kansas-Texas Railroad Company, a corporation, plaintiff in error, and respectfully moves the Court to withdraw, vacate and set aside the decision filed herein and to grant it a rehearing for the following reasons:

1. The Court, in its opinion, erred in holding that the trial court was correct in overruling the demurrer to the evidence and motion for directed verdict of plaintiff in error and submitting the case to the jury.

2. The Court, in its opinion, erred in holding that there was sufficient competent evidence presented by the defendant in error reasonably tending to establish defendant in error's cause of action alleged in his petition.

3. That the decision is in conflict with Section 126 of Title 66 of Oklahoma Statutes, 1961.

4. That the said decision is in conflict with the cases interpreting Title 66 of Oklahoma Statutes, 1961, Section 126.

WHEREFORE, plaintiff in error prays that the Court consider this second petition for rehearing, and the brief filed in support thereof; that the opinion heretofore filed herein on September 12, 1967 be vacated and withdrawn; and an order entered dismissing defendant in error's action or, in the alternative, that the cause be remanded to the lower court with instructions to sustain plaintiff in error's demurrer to the evidence.

Plaintiff in error further prays that, pending resubmission of this case, it be granted an oral hearing.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

BRIEF IN SUPPORT OF SECOND PETITION FOR REHEARING

STATEMENT

We hereby adopt and reassert the matter contained in our printed brief filed with our original petition for rehearing, and rely on the authorities and arguments made therein.

We wish to call to the Court's attention that Section 126 of Title 66 of Oklahoma Statutes Annotated provides as follows:

> "A bell of at least thirty pounds weight, *or* a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and shall also be liable for all damages which shall be sustained by any person by reason of such neglect." (Emphasis ours.)

It is well settled case law that a railroad company need not both sound a whistle *and* ring a bell in order to comply with Section 126 of the statute. See *Missouri, K. & T. Ry. Co.* v. *Raines* (Okla.), 158 Pac. 936. See also, *Missouri, O. & G. Ry. Co.* v. *Parker* (Okla.), 151 Pac. 325.

In the opinion of the Court filed in this case, the Court stated as follows:

> "The testimony of the four witnesses that their attention was first drawn to the train by the whistle immediately before impact and the finding of the jury that the statutory *signals*, blowing whistles *and* ringing bells, were not complied with by the defendant, necessarily includes a reasonable inference or conclusion that there was no signal, including the ringing of a bell of at least thirty pounds weight, prior to

the blast of the whistle which everybody heard." (Emphasis ours.)

This decision, if allowed to stand, will rewrite Section 126 of the statute that requires only that a bell *or* whistle be sounded and will, of course, reverse all the decisions that have heretofore held that the sounding of both the bell and the whistle were not necessary to comply with the statute.

If the Court, in its decision, meant to rewrite the statute and change the case law, then the decision should be allowed to stand as written. However, if this was not the intent of the Court, then this decision must be withdrawn.

We respectfully reurge that we be allowed to present oral argument to the Court in this cause.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Leave to File Second Petition for Rehearing; Motion for Extension of Time Within Which to File Same; and Motion for Permission to File Typewritten Brief with Duplicator-Printed Copies; Second Petition for Rehearing; and Brief in Support of Second Petition for Rehearing was mailed to Alan B. McPheron, Durant, Oklahoma and to Jake Hunt, 765 First National Building, Oklahoma City, Oklahoma, attorneys of record for defendant in error, this 21st day of November, 1967.

/s/ William J. Ross

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,
versus
CHESTER DEAN KISER,
Defendant in Error.

AMENDMENT TO SECOND PETITION FOR REHEARING

Come now the Missouri-Kansas-Texas Railroad Company, a corporation, plaintiff in error, and respectfully moves the Court to allow it to amend its Second Petition for Rehearing, on file herein, by adding the following, to-wit:

5. That the said decision is in conflict with the Constitution of the United States of America, and the amendments thereto, and specifically the Fourteenth Amendment, in that:

(a) The said decision denies the plaintiff in error equal protection of the laws; and

Leave is hereby granted to file this 22 day of November, 1967.

FLOYD L. JACKSON,
Chief Justice

(b) That the said decision denies the plaintiff in error due process of law.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Amendment to Second Petition for Rehearing was mailed this 22nd day of November, 1967, to Alan B. McPheron, Durant, Oklahoma and to Jake Hunt, 765 First National Building, Oklahoma City, Oklahoma, attorneys of record for defendant in error.

/s/ William J. Ross

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a Corporation,
Plaintiff in Error,

vs.

CHESTER DEAN KISER,
Defendant in Error.

Filed In Supreme Court of Oklahoma, Jan. 26, 1968
ANDY PAYNE, Clerk

ORDER

Upon written application of Plaintiff in Error it is ordered that our order of January 16, 1968, denying Plaintiff in Error's Application to File Second Petition for Rehearing & Motion for Oral Argument be amended to read as follows:

> "Second Petition for Rehearing and Amendment thereto and Motion for Oral Argument Considered and Denied."

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE ON THIS 26TH DAY OF JANUARY, 1968.

/s/ Floyd L. Jackson
Chief Justice